

DRAFT

MTC Uniformity Committee Marketplace Facilitator Work Group Issues List

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Objective: Develop sound principles or “best practices” to follow for states desiring to require marketplace facilitators to collect and remit sales/use tax on marketplace sales, in order to maximize compliance while minimizing the burden on marketplace facilitators and marketplace sellers.

Background

Growth in the volume of online sales facilitated through a marketplace continues to accelerate. Online marketplace sellers number in the millions, although most are quite small.

In order to increase sales/use tax collection compliance levels, several states are imposing requirements on marketplace facilitators to collect and remit the sales/use tax on marketplace sales. Following the *Wayfair* decision, this trend is expected to increase. The following states have enacted legislation requiring marketplace facilitators to collect and remit sales/use tax on marketplace sales, or giving marketplace facilitators the option to collect and remit tax or comply with notice and reporting requirements:

Minnesota (2017 HF 1, >\$10,000 sales, collect eff. 10/1/18)

Washington (2017 HB 2163, >\$10,000 sales, option to collect or notice/report eff. 1/1/18)

Rhode Island (2017 H 5175A, >\$100,000 sales or 200 or more separate transactions, option to collect or notice/report eff. 6/27/17)

Pennsylvania (2017 Act 43, \$10,000 sales, option to collect or notice/report eff. 4/1/18)

Alabama (2018 HB 470, \$250,000 sales, option to collect or notice/report eff. 1/1/19)

Oklahoma (2018 HB 1019XX, \$10,000 sales, option to collect or notice/report eff. 7/1/18)

Iowa (2018 SF 2417, \$100,000 sales or 200 separate transactions, collect eff. 7/1/19)

Connecticut (2018 SB 417, \$250,000 and 200 separate transactions, collect eff. 12/1/18)

New Jersey (2018 A4261, collect eff. 10/1/18)

Issues

1. The terms “marketplace,” “marketplace seller,” “marketplace facilitator,” “referral,” and “referrer,” or equivalent terms, should be clearly defined. Definitions should not overlap.

Example definitions are provided below—these are not necessarily recommended definitions, but can serve as a starting point for discussion.

“Marketplace” or “forum” (example—Connecticut definition of “forum”): a physical or electronic place, including, but not limited to, a store, a booth, an Internet web site, a catalog or a dedicated sales software application, where tangible personal property or taxable services are offered for sale.

“Marketplace seller” (example--Connecticut): any person who has an agreement with a marketplace facilitator regarding retail sales of such person, whether or not such person is required to obtain a permit

The “marketplace facilitator” definitions enacted in various states to date vary between narrow and broad.

“Marketplace facilitator” (narrow definition example—Connecticut): any person who (A) facilitates retail sales of at least two hundred fifty thousand dollars during the prior twelve-month period by marketplace sellers by providing a forum that lists or advertises tangible personal property subject to tax . . . or taxable services, including digital goods, for sale by such marketplace sellers, (B) directly or indirectly through agreements or arrangements with third parties, collects receipts from the customer and remits payments to the marketplace sellers, and (C) receives compensation or other consideration for such services.

“**Marketplace facilitator**” (broad definition example--Washington): a business that does the following three activities:

1. Facilitates the sale of a marketplace seller’s product through a marketplace for payment.
2. Engages, directly or indirectly, in **any** of the following with respect to bringing the buyer and seller together:
 - Transmitting or otherwise communicating the offer or acceptance between the buyer and seller
 - Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together
 - Providing a virtual currency that buyers can use to purchase products from the seller
 - Software development or research and development activities related to any activities with respect to the seller’s products listed below, if such activities are directly related to a marketplace operated by the person or an affiliated person.
3. Does **any** of the following activities with respect to the seller's products:
 - Payment processing services
 - Fulfillment or storage services
 - Listing products for sale
 - Setting prices
 - Branding sales as those of the marketplace facilitator
 - Order taking
 - Advertising or promotion
 - Providing customer service or accepting or assisting with returns or exchanges

A marketplace facilitator facilitates sales of a seller’s products through a marketplace and engages in other specified activities as provided by the law and outlined above. Websites that merely advertise goods for sale and do not handle transactions do not meet the definition of a marketplace facilitator.

Note: States using a narrow definition of “marketplace facilitator” limit the definition to include the person handling the customer’s payment. The broader definition does not have that limitation. This raises the question, if the marketplace facilitator is going to be required to collect and remit the sales/use tax, how can that be accomplished if the marketplace facilitator is not handling the customer’s payment? Also, how can the

marketplace facilitator properly report the transaction on a return if it does not have all the relevant information concerning the sale?

If the broader definition is used, suggest recommending an ordering rule that allows parties to mutually agree on the collection responsibility, with a default rule if no agreement is reached. Alabama's proposed marketplace facilitator rule addresses the possibility that multiple parties to a transaction may fall within its broad definition of a marketplace facilitator and incorporates an ordering rule with the option for the parties by contract to determine who will collect. Note: Alabama's proposed default rule (absent an agreement between two participating/collecting marketplace facilitators) is that the facilitator who lists the potential sale on its marketplace is required to collect and remit.

"Referral" (example—Connecticut): the transfer by a referrer of a potential purchaser to a seller who advertises or lists tangible personal property for sale on or in the referrer's medium.

"Referrer" (example--Connecticut): any person who (A) contracts or otherwise agrees with a seller to list or advertise for sale one or more items of tangible personal property by any means, including an Internet web site and a catalog, provided such listing or advertisement includes the seller's shipping terms or a statement of whether the seller collects sales tax, (B) offers a comparison of similar products offered by multiple sellers, (C) receives commissions, fees or other consideration in excess of one hundred twenty-five thousand dollars during the prior twelve-month period from a seller or sellers for such listings or advertisements, (D) refers, via telephone, Internet web site link or other means, a potential customer to a seller or an affiliated person of a seller . . . , and (E) does not collect payments from the customer for the seller. For purposes of this subdivision, "shipping terms" does not mean a seller's mere mention of general shipping costs in the seller's own listing or advertisement.

"Referrer" (example—Washington): a person that meets all of the following conditions:

1. Contracts or otherwise agrees with a seller to list or advertise for sale one or more items in any medium, including a website or catalog
2. Receives a commission, fee, or other consideration from the seller for the listing or advertisement
3. Transfers, via telephone, internet link, or other means, a purchaser to a seller or an affiliated person to complete the sale
4. Does not collect receipts from the purchasers for the transaction

The definition of "referrer" does not include a person that:

- Is engaged in the business of printing a newspaper or publishing a newspaper
...
- Provides internet advertising services and does not ever provide either
 - The marketplace seller's shipping terms
 - Advertise whether a marketplace seller charges sales tax

Note: The marketplace facilitator should be required to collect/remit only if it handles customer's payment. A referrer should not be required to collect/remit, since a referrer does not receive or handle the customer's payment. States may consider imposing notice/reporting requirements on a referrer.

- 2. If a state establishes an economic nexus threshold for requiring collection of sales/use tax by a marketplace facilitator, it should clearly state how that threshold should be determined with respect to a marketplace seller, marketplace facilitator, or referrer. States should consider a sales volume threshold, without an alternative separate number of transactions threshold, or include both sales volume and separate number of transactions in the threshold.**

Example: A requirement to collect and remit sales tax should exist only when the marketplace facilitator facilitates sales volume of more than \$100,000 in the state in the prior calendar year and 200 or more separate transactions in the state in the prior calendar year.

- 3. Registration and return filing requirements should not be conflicting or duplicative. If the marketplace facilitator is required to register, collect and remit the sales/use tax on facilitated sales, then the marketplace seller should not also be required to register or report those same sales.**

One of the administrative savings from states requiring marketplace facilitators to register, collect and remit sales/use tax should be elimination of the need to register the large volume of marketplace sellers. If marketplace seller is making direct sales or using other marketplace facilitators that are not collecting, the marketplace seller may

have a registration, collection and remittance obligation. The marketplace seller and facilitator should have the option to agree on which party will register, collect and remit the sales/use tax. If marketplace seller registers, collects and remits the tax, then the marketplace facilitator should not need to register and collect as to those sales.

Feedback from some marketplace facilitators is contrary to this recommendation. Instead the stated preference is to require a participating/collecting facilitator to collect on all sales made on the platform whether or not the marketplace seller has a collection obligation in the state into which the sale is delivered. This ensures greater simplicity of administration for the facilitator and provides certainty that the collection and remittance requirement is satisfied on all sales made through the platform.

Example (New Jersey): a marketplace facilitator shall not be required to collect and pay the tax imposed under [statutory cite omitted] on a retail sale if the marketplace seller for whom the retail sale is facilitated holds a certificate of registration pursuant to [statutory cite omitted] and provides a copy of the certificate of registration to the marketplace facilitator prior to the retail sale. Nothing in this subsection shall be construed to interfere with the ability of a marketplace facilitator and a marketplace seller to enter into an agreement with each other regarding the collection of the tax imposed under [statutory cite omitted] .

A multichannel retailer may have a brick and mortar store, make direct online sales, use one or a marketplace facilitators or referrers, or itself act as a marketplace facilitator or referrer. The state should establish clear rules for determining the multichannel retailer's registration, collection and remittance responsibilities, so as to avoid conflicting or duplicative requirements.

4. The person registering, collecting, remitting tax and filing returns is the person that the state should audit. That person must comply with the state's record keeping requirements.

Example (New Jersey): Upon the request of the director, a marketplace facilitator shall demonstrate compliance with the provisions of [statutory cite omitted]. A marketplace facilitator otherwise shall not be subject to audit by the department with respect to the retail sales for which it is required to collect and remit the tax imposed under [statutory cite omitted]. Nothing in this subsection shall preclude the department from auditing a marketplace seller with respect to retail sales facilitated by a marketplace facilitator on the marketplace seller's behalf.

Example (Alabama): Marketplace facilitators that collect simplified sellers use tax under this section shall report and remit the tax in accordance with [statutory cite omitted], and shall maintain records of all sales delivered to a location in Alabama, including copies of invoices showing the purchaser, address, purchase amount, and simplified sellers use tax collected. Such records shall be made available for review and inspection upon request by the department.

5. States imposing a sales volume-based economic nexus threshold for sales/use tax should also consider adopting a economic—or factor presence--nexus threshold for income tax.

Marketplace sellers or marketplace facilitators that exceed the state's economic nexus threshold for sales/use tax may have remaining uncertainty about whether they will be subject to the state's income tax. Given the narrow profit margins that smaller marketplace sellers may operate within, they may exceed the state's economic nexus threshold for sales/use tax and still have minimal, if any income tax liability. The obligation to file income tax returns in a state, even if the tax liability is minimal, can be a considerable expense for the marketplace seller. States should consider adopting a higher sales-volume economic nexus threshold for income tax. Also, a small marketplace seller using a marketplace facilitator in the state may have inventory located in the state. States should consider establishing a de minimis property income tax nexus threshold, so that if the marketplace seller's only property in the state is a small amount of inventory, it could fall below that de minimis level.

Example: The MTC “factor presence” nexus standard for business activity taxes provides that substantial nexus will exist if the taxpayer has any one of the following: at least \$500,000 in sales, \$50,000 in property, \$50,000 in payroll, or 25% or more of total property, sales, or payroll in the state. Those thresholds are periodically adjusted for inflation.

6. States should strive to simplify the registration process and require the minimum information necessary from the marketplace seller or facilitator.

Examples: Foreign companies need to be able to register without an FEIN or SSN. States should consider eliminating requirements for remote marketplace sellers to register with the secretary of state, if such requirements exist.

7. States should provide liability protection to marketplace facilitators when errors in collection and remittance are due to marketplace seller providing erroneous information to the marketplace facilitator.

Example (Oklahoma): A marketplace facilitator or a referrer is relieved of liability under subsection B of this section if the marketplace facilitator or the referrer can show to the satisfaction of the Commission that the failure to collect the correct amount of tax was due to incorrect information given to the marketplace facilitator or the referrer by a marketplace seller or remote seller.

8. States should provide protection to collecting marketplace facilitators against risk of class action lawsuits.

Example (Oklahoma): A class action may not be brought against a marketplace facilitator or a referrer on behalf of purchasers arising from or in any way related to an overpayment of sales or use tax collected by the marketplace facilitator or the referrer, regardless of whether such action is characterized as a tax refund claim. Nothing in this subsection shall affect a purchaser's right to seek a refund from the Commission pursuant to [statutory cite omitted].